

**IN THE SUPREME COURT
OF THE STATE OF MISSOURI**

SC87069

STATE OF MISSOURI,

Plaintiff/Respondent,

v.

RONNIE REEDER,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE ROBERT H. DIERKER, JR., JUDGE
ON TRANSFER FROM THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT, ED84507

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. *RETROSPECTIVE APPLICATION OF LONG*

Time line

A jury found Jeffrey Long guilty of rape and sodomy on December 12, 2002. Nearly fifteen months later, on March 3, 2004, a jury found Ronnie Reeder guilty of statutory rape and attempted child molestation. Less than three months later, on July 1, 2004, the Supreme Court of Missouri reversed Long's conviction, holding that the exclusion of extrinsic evidence of the complaining witness's prior false allegations deprived Long of his right to a fair trial under the Missouri Constitution. State v. Long, 140 S.W.3d 27, 31 (Mo. 2004).

Though the case clearly was pending upon direct review, on June 28, 2005, the Missouri Court of Appeals- Eastern District affirmed Reeder's conviction, holding that Reeder was not entitled to the same fair trial that Long was because Long got to the Missouri Supreme Court first and the holding in that case could be applied purely prospectively. State v. Reeder, 2005 WL 1513104 at *5 (Mo. App. E.D. 2005).

Long's trial was before Reeder's trial. Long was granted a new trial less than three months after Reeder was convicted. Yet when the Eastern District affirmed Reeder's conviction, Reeder did not receive the constitutional protections that this court found Long was entitled to. The Eastern District's holding is unjust, unfair, and violates the basic norms of constitutional adjudication. Further, it is not in accordance with Missouri law regarding retroactivity.

Walker is Not the Correct Standard

The State argues that Long should not apply to Mr. Reeder because Long was decided after Reeder's trial. The State argues that State v. Walker should apply here, and that because Long dealt with the admissibility of evidence, it is procedural and should be applied purely prospectively. This argument is unpersuasive. First, in Missouri, the retrospective application of new constitutional procedural rights is not well represented by the analysis discussed in Walker.

In Griffith v. Kentucky, the United States Supreme Court held that "a new rule for conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception." 479 U.S. 314, 328 (1987). In State v. Whitfield, the Missouri Supreme Court recognized Griffith's holding as the law in Missouri. 107 S.W.3d 253, 266 (Mo. banc 2003). Thus, in Missouri, a new constitutional procedural right will be applied retrospectively to all cases pending on direct review. Id. Long involved a new constitutional procedural right, and thus it is entitled to retroactive application.¹ As Mr. Reeder's case is

¹ The right to present evidence of prior false allegations is a constitutional one in many jurisdictions. See Jennifer Bukowsky, Note, *The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 MO. L. REV. ___, __ (forthcoming in 2005) (currently available at <http://www.law.missouri.edu/lawreview/priorfalseallegations.pdf>) (Appended hereto: A-9,

pending upon direct review, Long applies retrospectively to it. Since extrinsic evidence of the extensive prior false allegations of the accusing witnesses was excluded in Reeder's trial, Reeder is entitled to a new trial.

Griffith is not limited to new rights announced by the United States Supreme Court. Missouri Courts apply rules announced by the Missouri Supreme Court retroactively in accordance with Griffith. In State v. Thurman, a rule announced by the Missouri Supreme Court while the defendant's case was pending on direct appeal was applied retroactively. 887 S.W.2d 403 (Mo. W.D. 1994).

An examination of the policy reasons behind retrospectivity of a rule such as the one announced in Long clarifies why the only fair result in the present case is to grant Reeder a new trial. First, there is the principle that a court may not disregard current law when it adjudicates a case pending before it on direct review. Griffith 479 U.S. at 326. The integrity of the judicial system requires that court apply a new rule to all similar cases pending on direct review. Id. at 322-23. To disregard current law in adjudicating similar cases on direct review is quite simply an assertion that [the court's] constitutional function is not one of adjudication but in effect of legislation. Id. at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1975)). If Courts do not

FN. 82)

apply the best understanding of governing constitutional principles to all cases pending before them on direct review, then it is difficult to see why [they] should adjudicate any case at all. *Id.* The law in Missouri when the Eastern District heard the appeal was that defendants were constitutionally entitled to present extrinsic evidence of prior false allegations. Contrary to its function, the Eastern District Court of Appeals disregarded the current law in Missouri allowing extrinsic evidence of prior false allegations when it refused to apply *Long* to Reeder.

Second, a selective application of new rules violates the principle of treating similarly situated defendants the same. *Id.* at 323. It is the nature of the judicial system that precludes [the court] from simply fishing one case from a stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by the new rule. *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1975)). The problem with not applying new rules to cases pending on direct review is the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule. *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 556 (1982)). Here, Long was the chance beneficiary of a new rule. The nature of the judicial system precludes fishing Long out from the stream of appellate cases and refusing to accord Reeder the same treatment. To do so would cause an actual inequity to result, because Reeder is certainly entitled to the same constitutional protections as Long.

Walker decision is nothing like Long decision

Walker did not hold that all rules dealing with the admissibility of evidence were procedural in nature. The court stated that A[r]ules of evidence are *generally* considered procedural in nature.@ State v. Walker, 616 S.W.2d 48, 49 (Mo. banc 1981) [emphasis added]. Further, Walker dealt with a change in law whereby evidence of polygraph examinations was inadmissible at trial. Id. at 48. Prior to the ban on polygraph examinations, those examinations were only admissible if both parties had voluntarily stipulated to the admissibility of the test results. Id. The rule was changed for reasons of scientific reliability, not a constitutional right. Id. Under Long, extrinsic evidence of prior false allegations is admissible as part of a defendant's constitutional right to a fair trial. Long, 140 S.W.3d at 31. The admissibility of prior false allegations to provide a fair trial simply does not belong in the same category as the inadmissibility of polygraph examinations even where both parties stipulated to their admissibility. Long addresses a constitutional right. As such, it should be applied retrospectively to appeals on direct review.

Reeder has a stronger case than Long

In fact, Reeder had a much stronger case for admission of extrinsic evidence than Long did. First, there was the disparity in physical corroborating evidence. In Long, there was substantial physical evidence that the complaining witness was attacked. Long, S.W.3d at 35 (Limbaugh, J., dissenting). She was severely beaten

over her entire body, she was bleeding from her rectum, and she had extensive bruising, swelling, and abrasions to her labia and vaginal area. Id. However, there was absolutely no physical evidence to corroborate the complaining witnesses' allegations in Reeder. In fact, the shorts that one of the girls claimed to have been wearing while having sex with Reeder were tested for semen, but no semen was found on them. Tr. 315-17. Thus, credibility was more of a central issue in Reeder than it was in Long.

Second, the nature of the prior false allegations was much more probative in Reeder than in Long. In Long, most of the evidence proffered by Long as to prior false allegations was dissimilar to the crime charged. See Jennifer Bukowsky, Note, *The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 Mo. L. Rev. __, __ (forthcoming in 2005) (currently available at <http://www.law.missouri.edu/lawreview/priorfalseallegations.pdf>) (Appended hereto: See p. A-21, FN. 167). Only part of the testimony involved sexual misconduct, the rest of it concerned an incident where the complaining witness accused another man of threatening her and on a separate occasion hitting her in the head with a rock. Long, 140 S.W.3d at 29-30. In contrast, one of the complaining witnesses in Reeder falsely accused five other men of rape and had also called ADFS and the police to falsely accuse her mother of misconduct. 331, 339-43. Additionally, another witness had made prior false allegations of rape as well. Tr. 293-98, 339, 342. In these prior false allegations, the men were similarly situated to Reeder in that they acted in a position of authority to the girls, and the girls retaliated by making the accusations. Tr. 337-

344. Thus, the accusations are nearly identical to the charged offense in Reeder, whereas in Long there was little similarity between the accusation and the charged offense.

II. *PRESERVATION AND PREJUDICE*

The nature of Aold Constitutional rights@

The state=s argument that the right to a fair trial is an old constitutional right is misplaced. The United States Supreme Court does not announce new constitutional rights. It announces new standards for protecting existing rights. A new standard is not a new right or law A but an application of what is, and theretofore had been, the true law.@ Linkletter v. Walker, 381 U.S. 618, 623 (1965). The Court creates rules based on existing provisions of the constitution. A Each constitutional rule of criminal procedure has its own distinct functions.@ Stovall v. Denno, 388 U.S. 293, 297 (1967). To argue that the right to a fair trial is an old right and therefore Reeder should have objected at trial when the rule regarding extrinsic evidence had not yet been announced is absurd. A Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.@ State ex rel. Simmons v. Roper, 112 S.W.3d 397, 401 n. 3 (Mo. banc 2004)(*quoting* Reed v. Ross, 468 U.S. 1, 16 (1984)). The Missouri Supreme Court and the United States Supreme Court often apply new rules based on existing constitutional rights retrospectively or retroactively,

without requiring that the defendant have the foresight to object to a violation of a rule that was not yet announced. See Ker v. State of California, 374 U.S. 23 (1963); Fahy v. State of Connecticut, 375 U.S. 85 (1963); Stoner v. State of California, 376 U.S. 483 (1964); Roberts v. Russell, 392 U.S. 293 (1968); State v. Ussery, 452 S.W.2d 146 (Mo. banc 1970); State v. Whitfield, 107 S.W.3d 253 (Mo banc 2003).

Specific prejudice suffered by Mr. Reeder at trial

The State's Substitute Brief repeatedly asserts that Mr. Reeder suffered no prejudice from the trial Court's denial of his right to present extrinsic evidence of prior false allegations. The State alleges that, Unlike Long, Appellant's attorney did not object to the trial court's rulings on extrinsic evidence and did not make any offers of proof. Appellant also has not identified in his brief any extrinsic evidence that he was prevented from offering. Respondent's Substitute Brief, p. 12.

Mr. Reeder's argument is, and has always been, that he was denied the opportunity to present specific enumerated pieces of evidence to impeach the accusing witnesses' testimony. Furthermore, the trial court's repeated rulings on this issue, over the objection of defense counsel, made it absolutely impossible for trial counsel to offer extrinsic evidence of, or even cross-examine on, broad swaths of properly admissible material without resorting to tactics that would have been obstinately antagonistic of the trial court.

Trial counsel tried to introduce evidence that Tanya Wright had made false

allegations against her mother to the Department of Family Services. Tr. 334-35. The trial court sustained every objection to this evidence. Tr. 334-35. Trial counsel tried to introduce evidence of non-sexual, as well as sexual, false allegations. Tr. 162-67. However, using various rationales the trial court repeatedly prevented even cross-examination on these issues. Tr. 163 (non-sexual false allegations are collateral); Tr. 164-165 (false allegations are irrelevant unless made against the defendant); Tr. 166 (false allegations against non-family members are irrelevant); Tr. 166 (complaints to DFS would be collateral and inadmissible); Tr. 167 (specific incidents are categorically irrelevant to the witness's character); Tr. 167 (accusations against family members are relevant, but extrinsic evidence that the accusation was true or false is not relevant unless the accusation is sexual); Tr. 167 (any accusation made after the initial disclosure is irrelevant); Tr. 168-69 (no cross-examination on issues after the fall of 2000 will be allowed); Tr. 168-69 (no extrinsic evidence after the fall of 2000 will be allowed on any issue); Tr. 170-71 (false allegations against individuals other than the defendant are irrelevant because, Ashe can hate her mother all she wants. That doesn't have anything to do with whether she hates the defendant.) Tr. 171 (Alm indicating provisionally, she can deny anything she wants, you know, if it's a collateral matter. We're not going to go into extrinsic proof to establish the proof of it one way or the other.) Tr. 173 (trial court further clarifies, sua sponte, that the fall of 2000 is the cut-off for cross-examination.) Tr. 335 (the trial court cuts-off direct examination of Tina Marie Pulley at the fall of 2000.).

Trial counsel tried repeatedly to persuade the trial court to admit evidence that bore directly on the critical issue of credibility. The trial court was not to be persuaded. Mr. Reeder recognizes that every piece of available extrinsic evidence available to him was not introduced at trial^{CC}that is the basis of his appeal. The trial court was consistently resolute in its denial of trial counsel's repeated attempts to introduce any extrinsic evidence whatsoever. Possibly trial counsel should have shouted his offers of proof over the thunder of the trial court's gavel. However, he did not. He tried to make legal arguments to the court in an effort to open an area of advocacy that had been completely shut-off to him. The State contends that after being repeatedly denied an inch, defense counsel should have demanded a mile. In the context of a felony trial, where the court holds sway over subsequent ruling, such vociferous single minded advocacy is a ridiculous fiction. As this court wrote in *Long*, "The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement." *Long*, 140 S.W.3d at 32 *quoting State v. Barnett*, 628 S.W.2d 917, 920 (Mo.App. 1982). Trial counsel made clear what evidence he wished to present. In addition to the DFS allegations he wanted to be able to present evidence of a pattern of false allegations by these witnesses. The trial court made clear that defense counsel was only allowed to attack certain, limited areas of credibility, using certain limited types of evidence. The key rulings of the trial court were quoted at length in Appellant's Substitute Brief and leave no doubt that the court was steadfast in its decisions. Trial counsel went farther than most would in

advocating for his client on this issue.

The trial court did not comply with Long

The State argues in its substitute brief that Long was sufficiently complied with when defense counsel was allowed to question Tina Marie Pulley about prior false accusations made by Tanya Wright. The State is mistaken. The State contends that any extrinsic evidence, no matter how limited, on any topic, no matter how narrow, serves to cure the constitutional defect. There is no basis for this view in Long or any other case. Furthermore, the record is clear that Long's mandate was not complied with.

Tanya Wright previously accused Messiah Cross, Ed Bone, Carl Anderson, Dave Fanning and Dave Rogers of sexual assault. Tr. 331, 339-43. Lisa Webb also accused Carl Anderson of sexual assault. Tr. 342. As outlined above, the trial court severely restricted defense evidence based on time and type. The fall of 2000 was set as an arbitrary cut-off for all prior false allegations. Furthermore, the trial court demanded that any evidence be of sexual allegations only. Consequently, Tina Marie Pulley testified that Tanya had accused five men of rape and filed a DFS complaint against her, but she did not go into any specifics of the allegations due to the restrictions on the timing and type of the evidence. The State is correct that this constituted some extrinsic evidence of prior false allegations. However, the trial court's standing rulings prevented the defense from demonstrating that the prior allegations of sexual abuse were false through evidence other than testimony of Mr. Reeder's sister.

Additionally, the trial court's ruling that the fall of 2000 was the cut-off for extrinsic evidence shielded the fact finder from two years of lying and deceit by Tanya Wright and Lisa Webb.

During the cross-examination of Tanya Wright, defense counsel was only able to ask questions about one of the men due to the trial court's restriction on the right to present evidence. Furthermore, because Tina Marie Pulley was not allowed to give specifics about the accusations the jury was not even able to make a determination as to whether the accusations were true or false beyond the assertions of Ms. Pulley.

Lisa Webb had previously accused other men of sexual assault as well. Tr. 293-298, 339, 342. The various obstacles imposed by the trial court prevented details of these accusations. However, the existence of these prior false accusations was a part of the record, despite protestations to the contrary in the State's response brief. Furthermore, though Lisa wasn't per se a complaining witness, evidence of her prior false allegations is extremely relevant. Misty Owens denied most of the incidents in which the State charged that she had sex with Mr. Reeder. In fact, she denied having sex with him fourteen times during direct examination. 204-05, 217, 222, 226, 240, 249-50. Further, she denied ever being digitally penetrated six times before the prosecutor badgered her into saying that it had happened. Tr. 211, 213, 229-30. Virtually the only evidence that these things did occur came from the testimony of Lisa Webb. As such, her credibility was a central issue and defendant should not have been restricted in cross-examining her as to prior false allegations and should

have been allowed to present extrinsic evidence of them beyond the mere mentioning of it by Tina Pulley.

CONCLUSION

This Court should give retrospective effect to the rule established in State v. Long requiring the admission of relevant prior false accusations by a complaining witness. The right to present a full defense is guaranteed by the Missouri Constitution and cannot be enforced when the fact-finder is shielded from highly relevant non-collateral evidence of innocence. Furthermore, in this case, the only evidence supporting conviction was testimony from the alleged victims. Because Mr. Reeder was not allowed to attack this evidence, his conviction is subject to reversal.

WHEREFORE, Appellant, Ronnie Reeder, respectfully asks that his conviction

and sentence be reversed and that this cause be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Substitute Reply Brief of Appellant and a floppy disk was hand delivered to the Attorney General, State of Missouri, Supreme Court Building, Jefferson City, Missouri 65102 on this 11th day of October, 2005.

—
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CERTIFICATE OF COMPLIANCE

Counsel certifies that:

1) The floppy disk filed with this brief has been scanned for viruses and is virus-free;
and

2) The brief complies with the limitations contained in Rule 84.06(b) in that it
contains 3,118 words.

—

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APPENDIX

Jennifer Bukowsky, Note, *The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 MO. L. REV. __, __ (forthcoming in 2005)

(currently available at <http://www.law.missouri.edu/lawreview/priorfalseallegations.pdf>)

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